



What's Next After the Sackett Decision? **The Role of Local Governments in Wetlands Protection**

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Overview

- Background – Wetlands Protection Workshop & Primer
- Value & Importance of Wetlands
- Recent Reduction in Federal Wetlands Protections (*Sackett* Decision)
- Local Wetlands Protection Options (Regulatory & Non-Regulatory)
- Assistance Available for Local Governments
- Conclusions

Local Wetlands Protection Workshop

May 2024 Athens, GA



River Basin Center
UNIVERSITY OF GEORGIA



School of Law
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Local Wetlands Protection Primer

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2. Why Protect Wetlands?.....

3. Wetland Protection Under the Federal Clean Water Act.....

4. State Laws That Affect Wetlands.....

5. Local Government Action.....

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Sample Ordinances.....



Why is Wetlands Protection Important?

- What is a wetland?
- Value and importance of wetlands
- Depressional (isolated) wetlands

What is a Wetland?

“Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”
(Georgia DNR)

Key determinants: soil saturation*, hydric soils, hydrophytic vegetation

Types of Wetlands

Category	Location
Marine	Oceans
Estuarine	Estuaries
Riverine	Rivers
Lacustrine	Lakes
Palustrine	Marshes

~95% of Georgia's wetlands

Examples:

- Swamps
- Marshes
- Bogs
- Floodplains
- Beaver ponds
- Fens
- Vernal pools
- Carolina bays
- Limesinks
- Cypress domes
- Pine flatwoods
- Bottomland forest
- Etc.

Benefits of Wetlands

Protection from Storms – “Nature’s Sponge”

- Coastal storm protection
 - Reduce storm surges & wave energy
- Flood control
 - Water storage
 - Reduce floodwater heights and speed
- Drought resilience



**A 1-acre wetland
can store ~1
million gallons of
water!**

Benefits of Wetlands

Water Quality & Supply

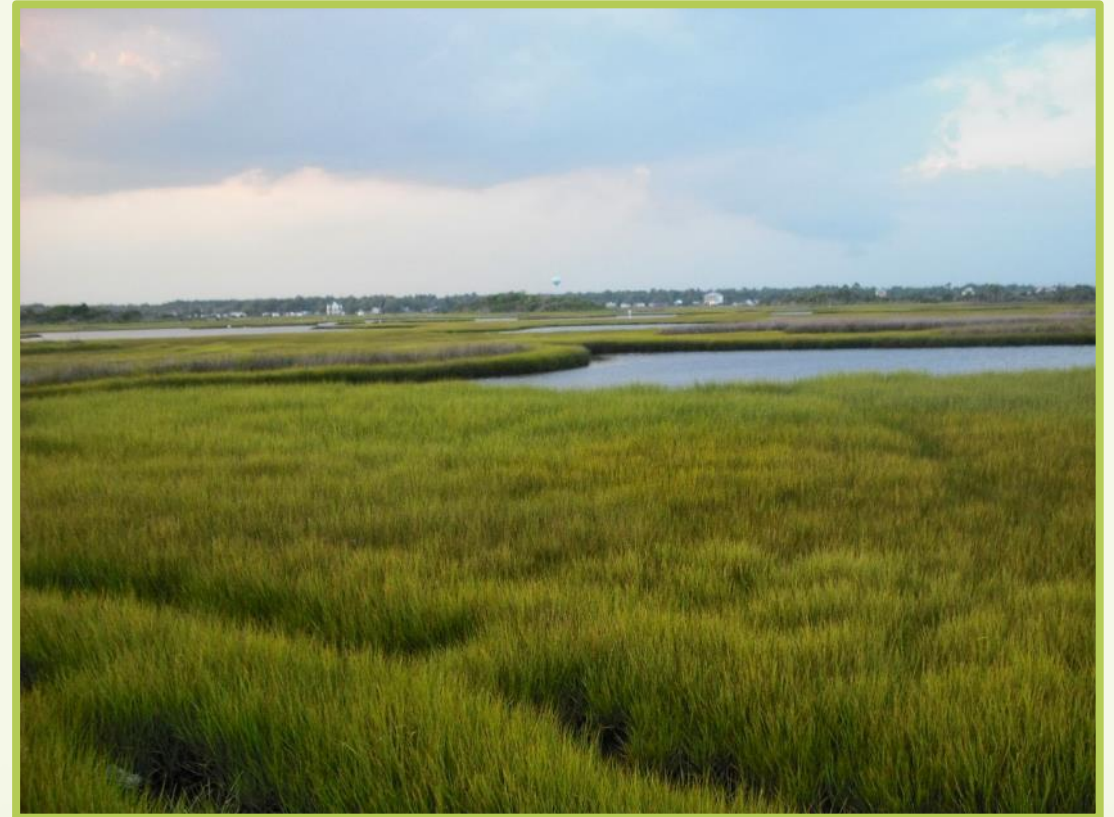
- Absorb and filter:
 - Sediments
 - Pollutants
 - Nutrients (nitrogen & phosphorus)
- Reduce downstream eutrophication
- Microbes break down toxins
- Groundwater recharge
 - Clean & replenish groundwater resources



Benefits of Wetlands

Erosion Prevention

- Stabilize shorelines and banks of rivers, streams, reservoirs, and estuaries
- Reduce turbidity & sedimentation



Benefits of Wetlands

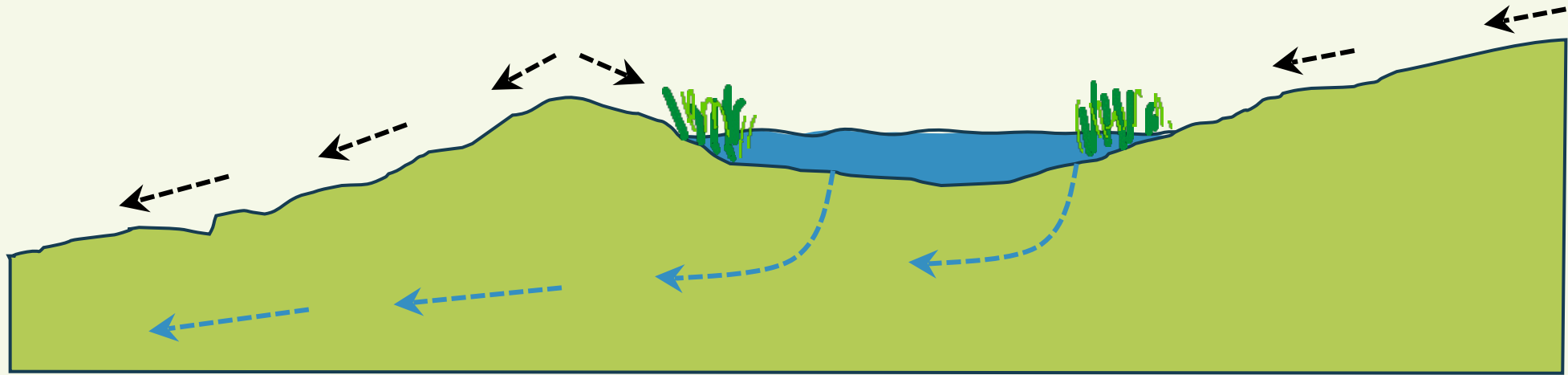
Fisheries Support, Wildlife Habitat, and Biodiversity



Benefits of Wetlands Recreation, Tourism, and Aesthetics



Depressional (“Isolated”) Wetlands



Federal Wetlands Protection & The *Sackett* Decision

- Federal jurisdictional wetlands
- Changes resulting from the *Sackett* Decision
- Wetlands protection in Georgia statutes

Clean Water Act of 1972 (“CWA”)

- **Goal:** to restore and maintain the biological, chemical and physical integrity of the Nation’s waters
- Regulates discharge of pollutants into waters of the United States, including the territorial seas (“WOTUS”)
- WOTUS generally rivers, many types of streams, lakes, oceans
- § 404 prohibits impacts to jurisdictional wetlands without permit

Jurisdictional Wetlands

- Jurisdictional wetland = regulated by CWA
- Wetland is jurisdictional if it is:
 1. Is a wetland → Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances to support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetland generally include swamps, marshes, bogs, and similar areas (33 CFR 328.3(c)(1); 40 CFR 120.2(c)(1))
 2. “Adjacent” to a WOTUS
- Jurisdictional wetlands and WOTUS varied over the past 50 years
- Prior to *Sackett*, wetlands with a significant nexus to a WOTUS were considered jurisdictional

Sackett v. Environmental Protection Agency

- U.S. Supreme Court decision, 598 U.S. 651 (2023)
- Significant narrowing of WOTUS and reduction of jurisdictional wetlands
- WOTUS = relatively **permanent**, standing or continuously flowing bodies of water known as streams, oceans, rivers, and lakes
- Jurisdictional wetland = must **have continuous surface connection** to a WOTUS with no clear demarcation between WOTUS and wetland

Sackett: Law and Science

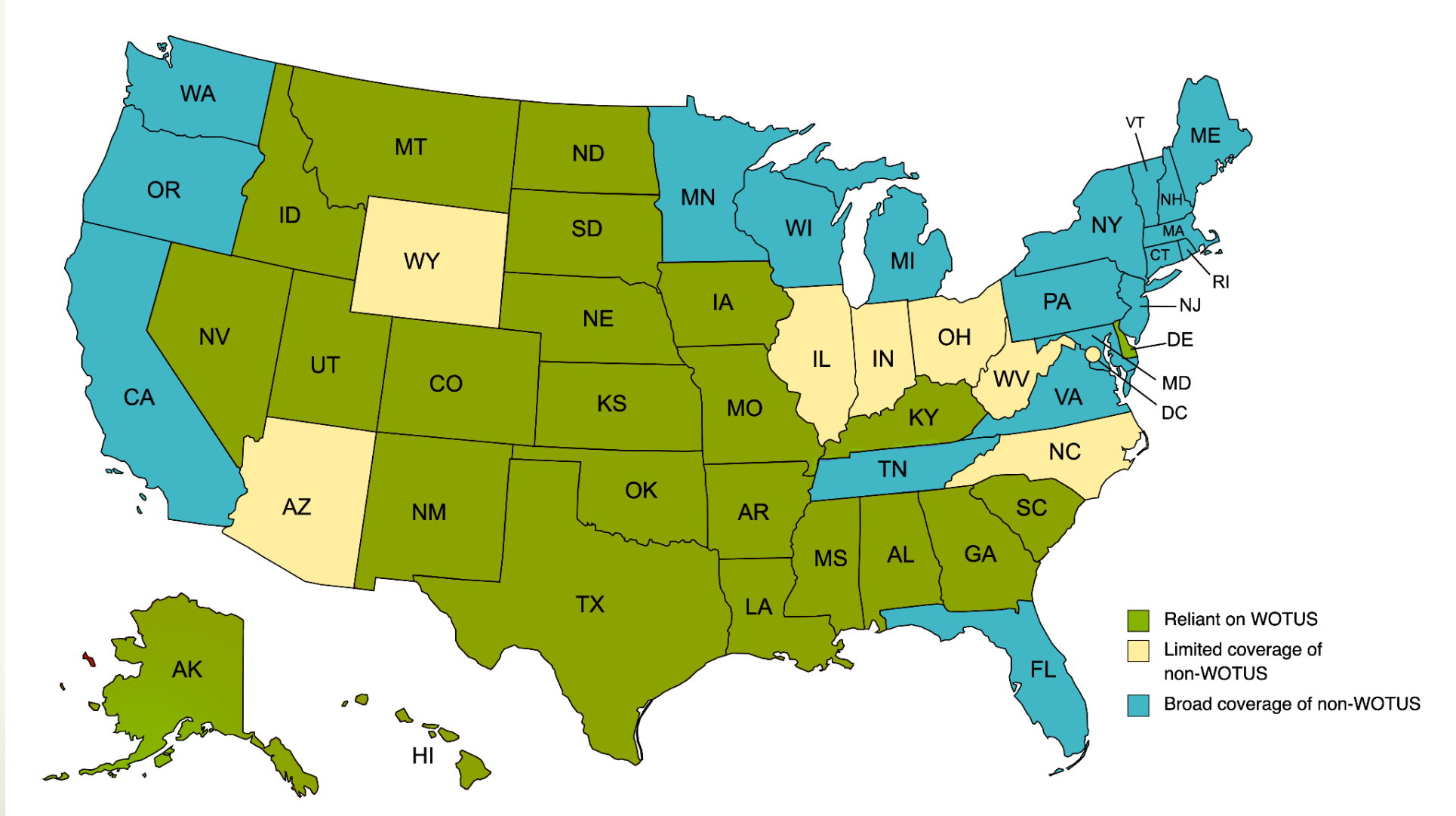
- Ignores hydrologic reality – subsurface and/or episodic connection to streams, even if separated by natural or manmade feature
- Ignores cumulative impact of wetland systems for water quality and flood protection
- ACE issued new regulations to reflect *Sackett* definitions (Sept. 2023)

Sackett Impact

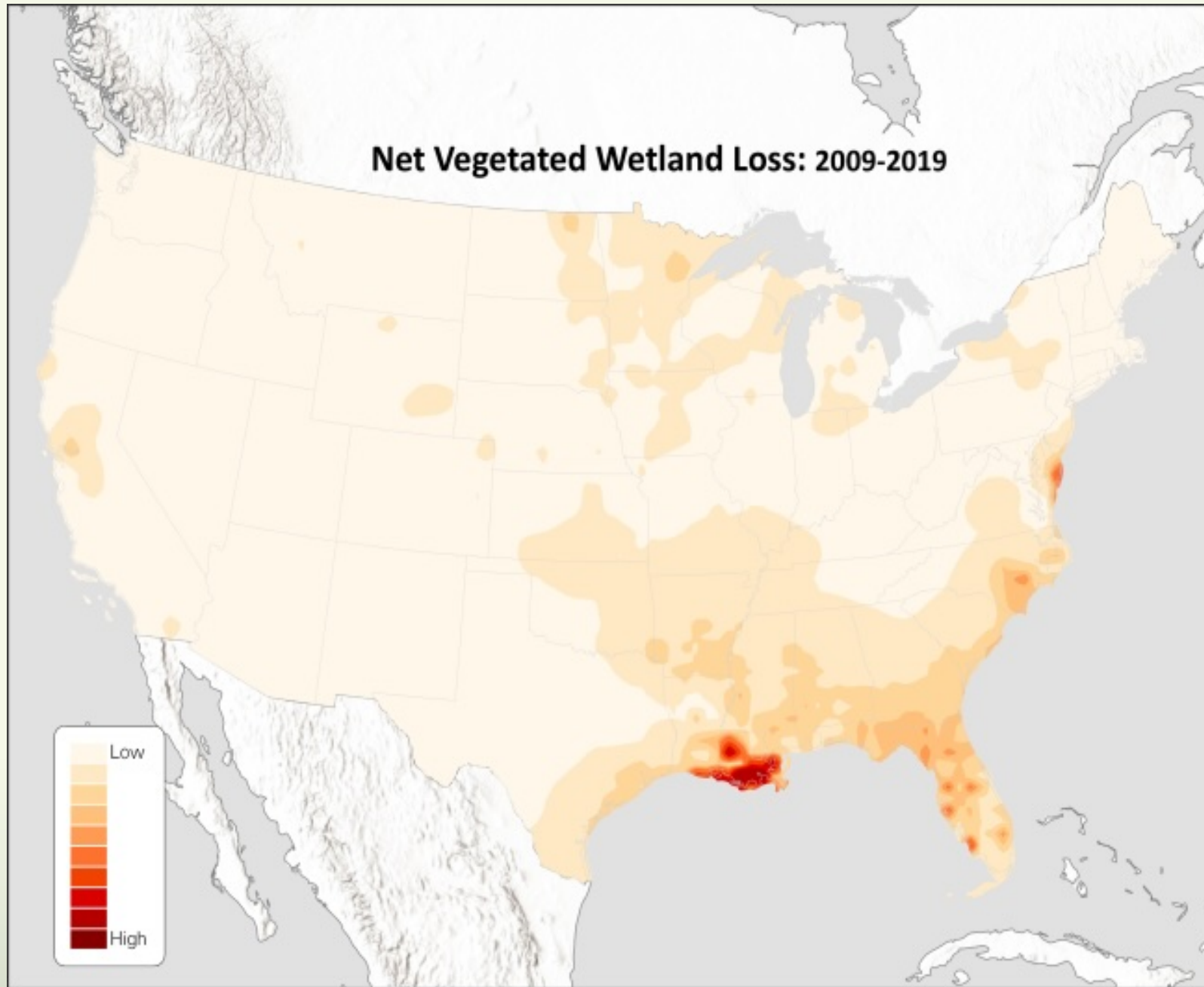
- Isolated/noncontiguous, intermittent wetlands no longer protected
- Significant reduction in number of wetlands protected by CWA, 404
- Estimates of > 50% of formerly protected wetlands nationwide no longer covered
- Uncertainties Remain: “relatively permanent,” “continuous surface connection,” no clear demarcation between the two, etc.

Why does this matter?

- 24 states rely on CWA for wetland protection, including GA
- Many GA wetlands no longer protected by CWA
- Georgia is approx. 13% wetlands; over 7.7 million acres
- GA has lost over 23% of wetlands since colonial era (USFW, Dahl, 1989)
- Increasing need to protect drinking water quality, reduce hazard risk, provide habitat, sequester carbon, increase communities' climate resilience



James McElfish, State Protection of Waters: Turbidity Continues,” 52 ELR 10679 (Sept. 2022)



Vegetated Wetlands Net Loss: 2009-2019, U.S. Fish and Wildlife Service/USFWS, Public Domain, <https://www.fws.gov/media/vegetated-wetlands-net-loss-2009-2019>

Georgia Statutes and State Action

- Coastal Marshlands Protection Act of 1970, O.C.G.A. § 12-5-280 et seq.
 - Permit required to alter tidal wetlands/marshlands; structures
 - DNR Coastal Resources Division
- Erosion and Sedimentation Act of 1975, O.C.G.A. § 12-7-1 et seq.
 - Goal to prevent degradation of water quality, loss of habitat, infrastructure damage
 - 25 ft stream buffers (50 ft on trout streams)
 - Land use activities must adhere to regs and BMPs
 - Requires use of control measures, permit, and enforcement

Georgia Planning Act of 1989, Part V Planning Criteria (Chapter 391-3-16)

- Local governments must regulate land disturbance activities via ordinances that meet or exceed
- DNR established minimum standards for protection of mountains, river corridors, water supply watersheds, groundwater, wetlands
- Wetlands must be identified/mapped by local gov't
- Comp. Plan should “address” a number of considerations about impact
- Should include uses that don't impair long term function
 - May include: timber, wildlife/fisheries, wastewater treatment, recreation, water treatment, as permitted under §404
- May prohibit: toxic/hazardous waste, landfills, other uses



Local Wetlands Protection Non-Regulatory Options

Local wetlands


- More community wetlands unprotected
- Non jurisdictional wetlands still a wetland with ecological role
- Local regulations may not protect non-jurisdictional wetlands
 - No local ordinances
 - Local protection relies on CWA jurisdiction (if jurisdictional then need a 404 permit)
 - Additional local requirements only apply if a finding of jurisdictional wetland under CWA

Local Action – Non-Regulatory Action

- Plan, Purchase and Protect: greenways, parks, flood reduction zones
 - Fee simple or conservation easements (“CE”)
 - Funding sources for acquisition: FEMA, NRCS, SPLOST, property tax
- Educate
- Restore
- Reduce property tax protected wetlands
- Zoning
 - Density increase or setback waivers for wetlands with a CE
 - Conservation subdivisions
 - Transfer of Development Rights program
 - Large lot zoning along streams/rivers with floodplains

Conservation Easements

- Legal agreement
- Permanently restricts uses on property to protect its conservation features
- Landowner continues to own land
- Some uses permitted
- Held by gov't or nonprofit that monitors and enforces
- Donated or purchased
- Tax incentives
- > 2,300 CEs in GA
- >775,000 acres protected by CEs



Local Wetlands Protection Regulatory Options

Local Action – Regulate to protect

- CWA authorizes protection beyond the federal floor
- Police Power to protect wetlands
 - Recognize economic and environmental benefits
 - Provide for limited uses as of right
 - Allow for carefully limited hardship variance
- Can define wetlands more broadly than CWA jurisdictional
- Can prohibit most impacts
- Simple (no impact to wetland) to complex (permit needed, requirements vary due to type of wetland, mitigation required, etc.)
- Focus on wetlands, buffers to wetlands, stream buffers, flood plains
- Use wetlands definition or refer to map (NWI) or create overlay

Range of Existing Approaches

- Rely on Erosion and Sedimentation requirements/BMPs
- Rely on stream buffer and flood plain ordinances
- Limit regulation to CWA jurisdictional determination = if not jurisdictional then no protection
- Require wetlands identified and considered as part of land disturbance permit – but no absolute prohibition on impact
- Regulate wetlands broadly defined, permits certain limited uses, prohibits all other impact (variances)

Post *Sackett* Review Existing Wetlands Provisions

- Are there wetlands ordinances/protections?
- How are wetlands defined?
- Are regs limited to mirroring 404 requirements?
- Are regs limited to jurisdictional wetlands?
- Look in wetland definition, maps, prohibited activities, when a permit required, and permit requirements
- Real world check: Is current approach preventing wetland loss?

Assistance for Local Governments

UGA Land Conservation Clinic

- Collaboration between UGA School of Law and Ecology
- Support land conservation
- Student led projects assisting nonprofits and government agencies
- Assist with drafting conservation easements, educational outreach, deed restrictions, review of ordinances and comp. plan, etc.
- Wetlands Protection Primer that provides overview and example ordinances

Regional Commissions*

- Comprehensive Plan updates
- Regional Planning: Regional Plan & Resource Management Plan for Regionally Important Resources
- GIS support (mapping)
- Grant applications and administration
- Find case studies, example ordinances, best practices
- Zoning/development code updates
- Networking, connections

**List of services offers varies among Regional Commissions.
Not all RCs provide all of these services!*

Conclusions

Summary

- Wetlands provide numerous environmental, ecological, and financial benefits
- “Jurisdictional” wetlands are wetlands regulated by the US under the Clean Water Act
 - Because of the *Sackett* decision, wetlands without a continuous surface connection to WOTUS are no longer jurisdictional, thus not federally protected
 - Georgia’s state wetlands protection statutes are reliant on WOTUS
- Local governments may define wetlands more broadly than WOTUS and may protect wetlands that are not jurisdictional
- **As a result of the *Sackett* decision, local governments now have a greater role to play in local wetlands protection, and have many regulatory and non-regulatory options to choose from**



Questions?

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